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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners,
230 South Clark St.,
Chicago, Ill.

BUTTERWORTH-WARREN PRINTING COMPANY, CHICAGO.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, and all other persons and corporations named as plaintiffs in the above entitled cause in the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully represent unto your Honors:—that on December 12, 1927, your petitioners, by an order of the Interstate Commerce Commission (R. 157 to 208), were severally held to be entitled to reparation from the respondents, Director General of Railroads and Union Stock Yard & Transit Company, aggregating $140,001.25, plus legal

interest and reasonable attorney's fees, as provided by statute (R. 157 to 208); that said last mentioned order was based on prior reports and findings of the Commission in said cause entered on June 2, 1925, (100 I. C. C. 266; R. 147 to 157), July 15, 1920, (58 I. C. C. 164; R. 141 to 146), and February 11, 1919, (52 I. C. C. 209; R. 121 to 140), respectively; that on the 10th day of December, A. D. 1928, your petitioners filed, in the District Court of the United States for the Northern District of Illinois, Eastern Division, (R. 4) their petition to recover damages on account of moneys exacted from them by respondents in accordance with the several amounts to which your petitioners were held to be entitled by the said order of the Interstate Commerce Commission entered, as aforesaid, on December 12, 1927; that on January 28, 1930, (R. 78) at a trial of said cause before a jury, the Honorable Charles E. Woodward, Judge of said District Court, directed the jury to find their verdict in favor of said respondents and against these petitioners, and thereupon entered judgment *nil capiat* against your petitioners and for costs; that thereupon an appeal was duly taken by your petitioners from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, which court, on July 27, 1931, (R. 389 to 399), affirmed said judgment of the District Court, except as to the portion of the said judgment of the said District Court awarding costs against your petitioners; that thereupon, within the time provided by the rules of said United States Circuit Court of Appeals, a petition for rehearing was filed by your petitioners (R. 405), which petition for rehearing was, on the 22nd day of September, 1931, denied, (R. 409).

The opinion of the District Court is reported in 39 Fed. (2nd) 80. (R. 60 to 77)

The opinion of the Circuit Court of Appeals is reported in 51 Fed. (2nd) 620. (R. 389-399)

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The present case is one arising under the Federal Transportation Act. The questions involved turn upon the administration, construction and interpretation of said Act.

The particular question involved is one of real substance growing out of a practice employed by respondents to exact from petitioners a charge of 25 cents per car for unloading live stock at the Union Stock Yards, in Chicago, in addition to the rates and charges set forth in the then existing published tariffs of the line-haul carriers operating under Federal Control.

The case is another chapter involving a controversy of long duration as to terminal charges of the railroads delivering live stock at the Union Stock Yards in Chicago. A history of its antecedents to the present litigation is found in *Cattle Raisers' Association* v. *Fort Worth & D. C. R. Co.*, 7 I. C. C. 513; *Cattle Raisers' Asso.* v. *C. B. & Q. R. Co.*, 10 I. C. C. 83; *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Cattle Raisers' Asso.* v. *Missouri, K. & T. R. Co.*, 11 I. C. C. 296; *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.*, 12 I. C. C. 507; *Inter. Com. Commission* v. *Chicago, etc., Rd. Co.*, 186 U. S. 320; *Interstate Commerce Comn.* v. *Stickney*, 215 U. S. 98.

The proceedings before the Commission in the instant case involved many lengthy and protracted hearings during which the testimony of nearly a hundred witnesses was introduced. (See Original Exhibits Nos. 5-6-7-8-9-10-11-12 certified to this court as original exhibits.)

The exhibits introduced in evidence before the Commission are extraordinarily voluminous and sufficient in bulk to make a small sized truck load. (See large box and

separate package of original exhibits certified to this court by the Clerk of the United States Circuit Court of Appeals). For the convenience of this court we have compiled and caused to be printed in a volume separate from the printed record, excerpts from said original exhibits containing matters germane to the points here under discussion, which printed volume is herein referred to as "Printed Excerpts from Original Exhibits."

Respondent Union Stock Yard & Transit Company was organized in 1865 by the railways delivering live stock to the Chicago market. It constructed the Union Stock Yards, consisting of chutes, pens, and the various appliances necessary for the unloading and marketing of live stock. It also built railroad tracks necessary to connect the various lines of railways which then reached Chicago with the Union Stock Yards, and entered into an arrangement with these railways by which they were to operate their own trains over the tracks of the Stock Yard Company to the stock yards without the payment of any other compensation than an unloading charge of 25 cents per car paid by the line-haul carriers to the Stock Yard Company. (*Cattle Raisers' Association of Texas* v. *Chicago, Burlington & Quincy Railway Co.*, 12 I. C. C. 508.)

In 1894 the Stock Yard Company announced its intention of imposing a charge for the use of the tracks leading to the stock yards of from 80 cents to $1.50 per car. The railways in turn, by tariffs duly filed and posted and effective June 1, 1894, imposed upon the shipper a charge of $2.00 per car for delivering carloads of live stock at the Union Stock Yards. (*Cattle Raisers' Association of Texas* v. *Chicago, Burlington & Quincy Railway Co.*, 12 I. C. C. 508.) The validity of said $2.00 terminal charge was before this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Railway Co.*, 186 U. S. 320,

where this court in its opinion sets forth the history of the organization of respondent Union Stock Yard & Transit Company, its objects and purposes, its relation to the railroads utilizing its facilities, the charges from time to time imposed by the Stock Yard Company on said railways, and the facts surrounding the filing by said railways in their published tariffs of a terminal charge of $2.00 per car, covering trackage, switching of cars, and the delivery of the live stock in the Union Stock Yards. An extract from the report of the Commission, shown in a note on pages 329 to 333 of the opinion in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Ry. Co.*, 186 U. S. 320, specifically shows that such terminal charge of $2.00 included the unloading of live stock at the Yards. The opinion in that case (p. 327) also calls attention specifically to the fact that said $2.00 terminal charge *includes* the trackage charge and *the cost of unloading.*

The same $2.00 terminal charge was again before this court in the case of *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, in which case, in the opinion, it also appears (p. 108) *that the charge for unloading live stock at the Yards was included in the $2.00 terminal charge.*

A portion of the so-called unloading charge was also included in the line-haul rates of the line-haul carriers and the expense of such unloading service set up in justification for such line-haul rates. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235, Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry. Co.*, 10 I. C. C. 428, Original Ex. 7, p. 1055; *Cattle Raisers' Assn.* v. *Fort Worth & Denver City R. Co.*, 7 I. C. C. 513, Original Ex. 7, p. 1040.)

The services rendered by the Stock Yard Company to the line-haul carriers in connection with shipments of live stock to and from the stock yards were found by the Commission to be as follows:

(a) Guaranteeing the railroad companies against loss arising out of the delivery of live stock without the surrendering of the bill of lading; (b) guaranteeing freight charges; (c) loading and unloading the freight; (d) notifying the consignees; (e) correctly tabulating the car numbers and contents of the car; (f) furnishing the weights to the carriers; (g) maintaining records as to dead and crippled animals and maintaining records showing deliveries to "billed consignees"; (h) furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago. (R. 127)

For all these services combined, the Stock Yard Company was paid by the line-haul carriers the full amount of the charges set forth in the published tariffs of the Stock Yard Company under the designation "loading and unloading of live stock" (R. 128; Original Ex. 6, pp. 316 to 324, 330, 473, 474—Printed Excerpts from Original Exhibits, pp. 21 to 40; Original Ex. 7, pp. 975 to 979—Printed Excerpts from Original Exhibits, pp. 61 to 65.)

The line-haul carriers in their published tariffs specifically named a commodity or line-haul charge of a certain amount per hundred pounds to the Union Stock Yards, in Chicago, which commodity or line-haul charge, plus a $2.00 per car terminal charge, constituted the through charge and included delivery of live stock to the consignee at the stock yards. See Commission's Finding of this fact (R. 144). (L. A. Lowrey Agent's Tariff No. 20-J, I. C. C. No. 37—Original Ex. 1.)

In the published tariffs of the line-haul carriers there was contained a specific line-haul or commodity rate to the Union Stock Yards, Chicago, known as the "flat Chicago rate" (Printed Excerpts from Original Exhibits, p. 172). Immediately after the Stock Yard Company was compelled to publish its tariff schedules, the line-haul car-

riers caused to be inserted in their tariff schedules a so-called absorption clause, in which it was in effect stated that said carriers, without further charge to the shipper than the charges contained in the line-haul rates and in the $2.00 terminal charge, would pay the unloading charges of the Union Stock Yard & Transit Company, specifically mentioning the then amount of such charges. After the Stock Yard Company, on May 21, 1917, had filed new tariff schedules increasing both its loading and unloading charges by 25 cents per car, the line-haul carriers made no change whatever, either in their line-haul rates, the $2.00 terminal charge, *or the language of the so-called absorption clause.*

Shortly prior to and during the period of the World War, on account of the increased cost of labor and expenses of transportation in general, the line-haul carriers were first granted a flat increase of 5 per cent on live stock shipments, and afterwards the tariffs thus increased by 5 per cent were again increased by a flat raise of 15 per cent (Original Ex. 7, pp. 890-891—Printed Excerpts from Original Exhibits, pp. 59-60). On May 25, 1918, by virtue of General Order No. 28, issued by W. G. McAdoo, Director General of Railroads, the transportation charges of the line-haul carriers for freight, including live stock, as theretofore increased, were increased by another flat raise of 25 per cent. On June 21, 1917, new tariff schedules of the Stock Yard Company increasing the so-called unloading charge by 25 cents per car were published. The Stock Yard Company in its published tariffs and in its subsequent actions made it clear that such published tariffs were intended not to affect the shipper, but were to affect only the charge to be made by it to the line-haul carriers, said tariffs reciting, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illi-

nois," (R. 250-251; Original Ex. 6, pp. 316-341; Printed Excerpts from Original Exhibits, pp. 21 to 36).

The line-haul carriers, after the increase of 25 cents per car by the respondent Stock Yard Company, made no corresponding change, or any other change, in their published tariffs on file with the Commission (R. 145, 390).

Shortly after the publication of such increased charges by the Stock Yard Company a controversy arose between it and the line-haul carriers concerning the manner of collecting this extra 25 cents per car, and who should pay it, the Stock Yard Company insisting that the line-haul carriers and not the shippers should be made to bear the burden of such increase (Original Ex. 6, pp. 10 to 38—Printed Excerpts from Original Exhibits, pp. 2 to 21).

The Stock Yard Company refused to collect the additional 25 cents from the shippers or their consignees, and took the position—

1. That the duty of unloading live stock at the Union Stock Yards had always been recognized by the line-haul carriers as one of their duties;

2. That it sustained no such relation to the shippers which would warrant it in collecting said unloading charges from the shippers;

3. That the tariffs filed by it were not intended to and did not affect the shippers, but were restricted to charges to be collected by it from the line-haul carriers for services performed by it as agent for said line-haul carriers;

4. That the so-called unloading charge covered other services exclusively for the use and benefit of the line-haul carriers and in which the shippers could have no possible interest or benefit.

(Original Ex. 6, pp. 10-38; Printed Excerpts from Original Exhibits, pp. 2 to 21).

In accordance with this position the Stock Yard Company collected the freight bills of the line-haul carriers figured on the basis of the line-haul rates plus the $2.00 terminal charge specified in the published tariffs of the line-haul carriers. The Stock Yard Company then refused to collect the additional 25 cents per car from the consignees, because it was not set up on the freight bills of the line-haul carriers. The Stock Yard Company, however, withheld this 25 cents per car from money in its hands due the carriers. Thereupon the line-haul carriers threatened to collect their own freight bills in order to prevent the Stock Yard Company from withholding the additional 25 cents per car. (Original Ex. 6, pp. 472-476—Excerpts from Original Ex. pp. 37-40).

To settle the controversy, the Stock Yard Company and the line-haul carriers agreed upon the following practice: The line-haul carriers did not amend their tariffs (R. 390) but after making out their freight bills on the basis of the line-haul rates and said $2.00 terminal charge specified in their published tariffs, added to the amount of freight thus ascertained the additional charge not named in their tariffs of 25 cents per car; the freight bills thus made out were turned over by the line-haul carriers to their agent, the Stock Yard Company, who collected from the petitioners herein the amount of the freight charges figured on the basis of the line-haul and terminal charges specified in the original tariffs of the line-haul carriers, plus the additional 25 cents per car, and turned the entire amount over to the line-haul carriers. Thereafter, in the due course of business, the line-haul carriers paid the Stock Yard Company the amount of its unloading charges set forth in the new tariffs filed by the Stock Yard Company. (Original Ex. 6, pp. 472-476—Printed Excerpts from Original Exhibits, pp. 37-40; Original Ex. 6, pp. 10 to 38—

Printed Excerpts from Original Exhibits, pp. 2 to 21; Original Ex. 6, pp. 496, 497, 579—Printed Excerpts from Original Exhibits, pp. 40 to 41, 51 to 58). This is the practice referred to in the report of the Commission (R. 123), and the practice which was declared unlawful and unreasonable by the Commission (R. 145). The practice inaugurated by the Stock Yard Company and the line-haul carriers before the period of Federal Control was continued by the Director General of Railroads during the entire period of Federal Control (R. 217-218).

In its report of February 11, 1919, (R. 121 to 140) the Commission likened the unloading of live stock to the unloading of ordinary freight, and applies the same rules to both, holding that it was not the duty of the line-haul carriers to unload live stock at the Union Stock Yards (R. 138). After the case was reopened on rehearing a great mass of testimony was introduced before the Commission bearing on the question of whether it was the duty of the shipper or of the carriers to unload live stock at the Union Stock Yards in Chicago. We refer particularly to the hearings of May 20th, May 21st and May 22nd, 1919, shown by Original Ex. 7. At said hearings it was shown that the line-haul carriers repeatedly, in justifying the line-haul rates, or any established new line-haul rates, set up their obligation to unload live stock at the Union Stock Yards in Chicago and their right to include such expense as a part of the transportation charge. (See Original Ex. 7, p. 1053; *Board of Trade* v. *C. & A. R. R. Co.*, 3 I. C. C. 235; Original Ex. 7, p. 1044; *Chicago Live Stock Exchange* v. *C. G. W. Ry.*, 10 I. C. C. 428; Original Ex. 7, p. 1055; *Cattle Raisers' Ass'n* v. *Fort Worth and Denver City*, 7 I. C. C. 555a; Original Ex. 7, p. 1040); it was also shown at said hearings that continuously from the year 1867 the line-haul carriers in their line-haul rate always included at Chicago the expense of unloading stock at the Union Stock Yards as a part of

their line-haul rate, (Original Ex. 6, p. 438); that at the terminal markets at Sioux City, Omaha and Kansas City, the next largest in size to the market in the City of Chicago, the obligation to unload live stock had always been assumed by the line-haul carriers without any charge whatever against the shipper, except as the same was included in the line-haul rate (Original Ex. 7, pp. 1077 to 1085; Printed Excerpts from Original Exhibits, pp. 69 to 75); that for more than fifty years, by reason of an arrangement between the Stock Yard Company and the line-haul carriers, the line-haul carriers assumed the obligation of unloading live stock at the Union Stock Yards in Chicago and paid the Stock Yard Company directly for such service (Original Ex. 7, pp. 1023, 1212); Findings of Commission (R. 144.)

PETITIONERS PAID THE UNLAWFUL CHARGE.

In each instance where said increase of 25 cents per car was exacted from your petitioners, the same was paid out of the individual funds or moneys of said commission merchants and members of said Chicago Live Stock Exchange and later charged back against said individual shippers or deducted from the proceeds due to said individual shippers from said shipments, with the representation and assurance by said commission merchants and members of said Chicago Live Stock Exchange that they, in behalf of said shippers, would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers. (Original Ex. 8, pages 25 to 96—pages 96 to 134; Original Exhibit 9, pages 21 to 685; see also Findings of Commission, R. 151.) Printed Excerpts from original Exhibits pp. 136 to 156; see also Rec. 329 to 331.

Andrew W. Mellon was, at the time of the commencement of this suit, the agent designated by the President,

pursuant to the provisions of Section 306 of the Transportation Act of 1920, against whom suits may be brought on causes of action arising out of the possession, use and operation by the President of the railroads and systems of transportation named in said Act (R. 236).

In its report of January 10, 1920, the Interstate Commerce Commission found that the stock yards were terminals for the receipt and delivery of live stock of the railroads utilizing them (R. 143); that for more than fifty years the line-haul carriers delivered live stock at the stock yards in Chicago and unloaded the same, making no separate charge therefor against the shipper, and that it was the duty of said line-haul carriers to unload and load live stock at the Union Stock Yards, Chicago; that the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, for years constituted the through charge and included delivery of live stock to the consignee at the stock yards (R. 144); that the Stock Yard Company was a common carrier engaged in interstate commerce, and that the services of unloading are a part of the transportation of live stock, and that the collection of separate charges for unloading, in addition to the published rates of the line-haul carriers on live stock from and to interstate points to and from the stock yards, was an unlawful and unreasonable practice (R. 145). Said order of the Commission found that reparation should be made on account of the exaction of said unlawful charges (R. 146).

The respondent Union Stock Yard & Transit Company, in its answer filed in the District Court, sets forth that it performed the unloading service for and on behalf of the carriers, and that its charges for such service were paid to it by the carriers (R. 23); that in unloading any shipments of live stock at said yards it was performing a service for and on behalf of the railroads hauling said live stock into and out of said yards and as their agent (R. 24).

The answer of respondent Director General of Railroads on this point admits that the unloading of live stock at said place was a part of the transportation of said live stock, but denies that such loading and unloading was a part of the transportation thereof furnished by carriers; that all charges made for such service in reference to live stock transported to and from said stock yards by said carriers were made by and paid to said Union Stock Yard & Transit Company (R. 34).

II.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. There is squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit an important question of Federal law which has not been, but should be, settled by this Honorable Court. That question is: Where a carrier holds itself out in its published tariffs to transport live stock under through rates and charges for the complete transportation, including the unloading of such live stock, may an extra charge for a part of the unloading service be exacted from the shipper, either by the carrier or its agent, on the basis of a tariff published and filed by the agent of the line haul carrier increasing its charge for such unloading service, without the line haul carrier first amending its published tariff of rates and charges purporting to cover the entire service?

The Circuit Court of Appeals in its opinion in effect has answered this question in the affirmative.

(Please see separate brief in support of petition, p. 9).

2. Another important question of Federal law squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit, which has not been, but which should be, settled by this Honorable Court is: May a common car-

rier engaged solely in performing terminal services as agent for another common carrier (where the latter in its published tariffs holds itself out to perform the entire through transportation service, including the terminal service, for certain rates and charges specified in its tariffs), so file its published tariffs as to restrict the application of the rates and charges therein to the common carrier for whom it as agent performs such terminal service? Or, stated in another way, may a common carrier engaged solely in the rendering of a terminal service to another line-haul carrier as its agent, lawfully file its tariffs of rates and charges as to make the same applicable only to the carrier for whom it is performing such service as agent?

The Circuit Court of Appeals in its opinion has in effect answered these questions in the negative.

(Please see separate brief in support of petition, p. 10).

3. Another important question of Federal law squarely raised by the decision of the Circuit Court of Appeals for the Seventh Circuit, which has not been, but which should be, settled by this Honorable Court, is: Does an absorption clause in the published tariffs of the line-haul carriers, to the effect that it will absorb and pay a certain portion of a terminal charge, such as the unloading of live stock, control and prevail over other portions of such published tariffs which undertake the performance of the entire transportation transaction including such unloading in consideration of the payment by the shipper of a fixed commodity charge plus a fixed terminal charge?

The Circuit Court of Appeals in its opinion has in effect held that in such case the "flat Chicago rate" plus the fixed $2.00 terminal charge in the published tariffs of the line-haul carriers must give way to such absorption clause.

(Please see separate brief in support of petition, p. 12).

4. The action of the Circuit Court of Appeals in ignor-

ing in its decision the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards" (R. 144), and in substituting its judgment for that of the Commission, in holding that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and said $2.00 terminal charge, was a clear departure from the accepted and usual course of judicial proceedings and from the rule well established by this court to the effect that where tariffs filed require consideration of matters of fact and application to expert knowledge for the ascertainment of the technical meaning of the rules and a correct appreciation of a variety of incidents affecting their use, the determination of the meaning of such tariffs calls for the exercise of the trained judgment of that body of experts appointed by law and informed by experience, namely, the Interstate Commerce Commission; that in such case the courts will respect and accept the finding of the Interstate Commerce Commission as to the meaning, force and effect of such tariffs. (*Standard Oil Co.* v. *United States,* 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, at 454; *Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285.)

(NOTE: The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect. Such tariffs are set forth in Original Exhibit 1, certified to this court, a few excerpts from the same being included in Printed Excerpts from Original Exhibits, pp. 165, 167, 169 and 172. The classifications referred to in the opinion of the Circuit Court of Appeals (R. 397) contained the same requirements that had been in the classifications for many

years; they were not specifically published shortly before this case arose, to apply at the Chicago market, as might be inferred from the opinion of the Circuit Court of Appeals.) Where official tariffs apply at a particular point as was the case at Chicago, said tariffs by their terms supersede the classification.

(Please see separate brief in support of petition, pp. 6, 7, 12, 13).

5. The action of the Circuit Court of Appeals in refusing to respect and accept the finding of fact by the Interstate Commerce Commission that it was the duty of the carriers to unload live stock consigned over the lines of the line-haul carriers to the Union Stock Yards at Chicago, and in substituting its judgment for that of the Commission on that subject, and holding (R. 397-398) that it was the duty of the shipper to unload his own live stock at the Union Stock Yards, or to directly pay respondent Union Stock Yard & Transit Company for performing such service a charge in addition to the amount set up in the line-haul rates and in the $2.00 terminal charge of the line-haul carriers covering said service, was a departure from the accepted and usual procedure of the courts in this kind of a case and directly contrary to the views expressed by this court in *United States* v. *Union Stock Yards,* 226 U. S. 286, *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, and *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441.

(Please see separate brief in support of petition, pp. 7-8).

6. The conclusion of the Circuit Court of Appeals that the additional charge of 25 cents per car for unloading was, in effect, collected by the Stock Yard Company (R. 396), though ingenuous, is contrary to the answer of the respondent Union Stock Yard & Transit Company (R. 23-24) and contrary to all of the facts in the case (Printed Ex-

cerpts from Original Exhibits, pp. 21 to 26, 34, 35, 38, 39, 40, 41, 52, 53, 54, 55, 56, 57, 165). Furthermore, the conclusion of the Circuit Court of Appeals that "notwithstanding the seeming circuity it was the Stock Yard Company which in effect collected the charge from the shipper or consignee," does not answer the proposition that since the service of unloading live stock was a service which the line-haul carriers in their published tariffs then on file held themselves out to perform for the rates and charges therein specified, the exaction from the shipper of any amount in excess of the published rates and charges of the line-haul carriers, by means of the unreasonable and unlawful joint practice referred to by the Commission (R. 123) and condemned by it (R. 144-145), rendered said line-haul carriers and said Stock Yard Company jointly and severally liable to your petitioners, regardless of which of them actually collected the money.

Lewis v. *Southern Pacific Co.*, 283 U. S. 654, at page 660.

See also *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, and *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.

(Please see separate brief in support of petition, pp. 17-18).

7. The conclusion of the Circuit Court of Appeals (R. 398) that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected on account of the increased cost of labor and other expenses in connection with the unloading of live stock, is a clear departure from the accepted and usual course of judicial proceedings in a case of this kind, for the reason that the rule is well established in this court and other Federal courts that courts are not only powerless to make rates, but are powerless to determine what are or are not reasonable causes for increasing

rates, such questions being committed by the Interstate Commerce Act to the judgment and wisdom of the Interstate Commerce Commission. (See *Los Angeles Switching Case,* 234 U. S. 294, at pages 310 and 311; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.,* 220 U. S. 235; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199; *Northern Pacific Co.* v. *Solum,* 247 U. S. 477.)

(Please see separate brief in support of petition, pp. 18-20).

8. The action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings in a case of this kind; by the affirmation of the judgment of the District Court the published opinion in that case has the effect of law and precedent. The point on which the District Court decided this case (R. 67 to 77) is in direct conflict with the established practice adopted by the Commission in the *Missouri Portland Cement Co.* case, 88 I. C. C. 492, *Legel Oil & Gas Co.* v. *Chicago & North Western Ry. Co.,* 179 I. C. C. 57, and in the forty or fifty other cases referred to in the opinion of Judge Woodward (R. 69), based on the principles of law and rule announced by this Honorable Court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531, and adhered to in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, and *Lewis* v. *Southern Pacific Co.,* 283 U. S. 654.

The decision of Judge Woodward in the District Court, sanctioned by the judgment of the Circuit Court of Appeals, is also in direct conflict with the uniform practice established by the Commission for many years with reference to the right of factors, representatives and agents to maintain reparation proceedings under the interpretation given the Interstate Commerce Act by the Interstate Com-

merce Commission, and supported by principles announced by this Honorable Court in *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, and *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 423. (*Legel Oil & Gas Co.* v. *Chicago & North Western Ry. Co.*; 179 I. C. C. 59; *Texas Live Stock Shippers Protective League* v. *Director General*, 139 I. C. C. 448; *Western Electric Co.* v. *Director General*, 87 I. C. C. 545; *Detroit Coal Exchange* v. *Director General*, 80 I. C. C. 258; *Memphis Freight Bureau* v. *St. Louis-San Francisco Ry. Co. and Director General*, 57 I. C. C. 212; *Hercules Powder Co.* v. *New York Central R. R. Co. and Director General*, 78 I. C. C. 55.)

The rule so announced by the District Court and sanctioned by the Circuit Court of Appeals is also directly contrary to the decisions of other District Courts, namely *Arcadia Mills* v. *Carolina C. & O. Ry.*, 293 Fed. 639; *Merchants & Manufacturers Traffic Ass'n* v. *United States*, 231 Fed. 292; *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.*, 39 Fed. (2d) 661.

(Please see separate brief in support of petition, pp. 20-25).

III.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Honorable Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered on its docket 4462, and entitled George J. Adams and A. W. Kitchen, copartners trading as Adams & Kitchen, *et al.*, *vs.* Andrew W. Mellon, Director General of Railroads, and Union Stock Yard & Transit Company; to the end that said cause may

be reviewed and determined by this Honorable Court as provided for by the statutes of the United States, and that the said judgment of said Circuit Court of Appeals for the Seventh Circuit be reversed and that your petitioners may have such other and further relief as this Honorable Court may deem proper.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners.

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CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners,
230 South Clark St.,
Chicago, Ill.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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carriers in the promulgation of a practice which resulted in the exaction from the shipper of a charge in addition to the charges specified in the published tariffs of the line-haul carriers, was a wrongful and tortious act, which rendered the line-haul carriers and the Stock Yard Company jointly and severally liable, regardless of which of them actually received the money or the benefit thereof 17-18

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. .....

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is reported in 39 Fed. (2d), 80. The opinion of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, is reported in 51 Fed. (2d) 620.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is July 27, 1931 (R. 389). The order denying the petition for rehearing was filed September 22, 1931 (R. 409).

2. This review is sought under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347.

3. The instant case is a civil one heard and determined in the Circuit Court of Appeals for the Seventh Circuit upon appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division, and involves the administration, construction, application and interpretation of the Interstate Commerce Act, a Federal statute.

III.

STATEMENT OF THE CASE.

The statement of facts in the petition herein, under paragraph 1, is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. Said Circuit Court of Appeals should have accepted the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for many years constituted the through charge and included delivery of live stock to the consignee at the stock yards," and the further finding of the Commission that the collection of the separate charges from the complainants "was an unlawful and unreasonable practice," instead of ignoring said findings of the Commission and substituting its own finding to the effect that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and the terminal charge.

2. Said Circuit Court of Appeals should also have accepted the finding of the Commission that the practice resorted to by respondents to collect from the shipper the extra 25 cents per car was an unlawful and unreasonable practice.

3. Said Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected and on account of the increased cost of labor and other expenses in connection with said unloading, and was properly the subject of an increased unloading charge outside of and beyond that which was otherwise included in the line-haul carriers' published transportation rates, for the reason that said court was without jurisdiction to determine whether or not said increase was reasonable or justifiable.

4. Said Circuit Court of Appeals erred in not accepting as conclusive the findings of the Commission based on sufficient evidence, that the duty of unloading live stock at the Union Stock Yards was that of the line-haul carriers, and in substituting its judgment for that of the Commission in holding that such duty was on the shipper.

5. Said Circuit Court of Appeals erred in finding that the collection of the charges complained of in this case was made by the Stock Yard Company, and in holding that such fact absolved the line-haul carriers from any liability to the shipper arising out of the exaction of the additional charge for unloading through the practice adopted by the line-haul carriers and the Stock Yard Company to exact said charge from the shipper.

6. Said Circuit Court of Appeals erred in holding that the practice by which the line-haul carriers and the Stock Yard Company exacted said increased unloading charge was lawful, because the Stock Yard Company's published tariffs compelled the Stock Yard Company to collect the 25 cents additional unloading charge and obviated the necessity of the line-haul carriers changing their published tariffs on file by showing such increase.

7. Said Circuit Court of Appeals erred in affirming the judgment of the District Court predicated on the theory that plaintiffs had no right to maintain the proceedings in question before the Interstate Commerce Commission and to prosecute said suit in the District Court.

V.

ARGUMENT.

Point I.

As we view this case, one of the outstanding questions presented and which the Circuit Court of Appeals lost sight of, is whether the unloading service at the Union Stock Yards was a service which the carriers in their published tariffs held themselves out to the public to perform and for which service compensation was provided for in the rates and charges set forth in said tariffs. A tariff schedule is made up of two parts: first, the service which the carrier holds itself out to the public to perform; second, its rates and charges for that service. It is obvious that any change in the service to be performed, *or any change in the extent of such service,* is equally as important and within the purview of Section 6 of ths Interstate Commerce Act as a change in the rates and charges specified for such service, and requires a corresponding change in the tariff schedules.

That the service of unloading live stock at the Union Stock Yards was a service which the line-haul carriers held themselves out to the public to perform, and for which service they were compensated by their line-haul rates and the $2.00 terminal charge, admits of no doubt. For more than fifty years prior to the commencement of the controversy in this case, the line-haul carriers hauling live stock to the Chicago market unloaded live stock at the Union Stock Yards and made no charge therefor against the shipper (R. 144). When the Interstate Commerce Act was enacted, the line-haul carriers included in their line-haul rates and terminal

charges in their published tariffs compensation to themselves for such unloading service. The line-haul carriers never at any time directly performed such unloading service, but by contract with the respondent Stock Yard Company an arrangement was made whereby the Stock Yard Company, as agent for the line-haul carriers, and for a consideration fixed in such contract, performed such service. After the passage of the Interstate Commerce Act, and after the Stock Yard Company was compelled to publish tariff schedules showing its rates and charges for the services performed by it, the arrangement between the line-haul carriers and the Stock Yard Company continued the same as before, with the exception that the charges of the Stock Yard Company to the line-haul carriers for the unloading service was fixed in the tariffs of the Stock Yard Company instead of by contract, as formerly.

Immediately after the Stock Yard Company was compelled to publish its tariff schedules, the line-haul carriers caused to be inserted in their tariff schedules a so-called absorption clause, in which it was in effect stated that said carriers, without further charge to the shipper than the charges contained in the line-haul rates and in the $2.00 terminal charge, would pay the unloading charges of the Union Stock Yard & Transit Company, specifically mentioning the amount of such charges. After the Stock Yard Company, on May 21, 1917, had filed new tariff schedules increasing both its loading and unloading charges by 25 cents per car, the line-haul carriers made no change whatever, either in their line-haul rates, the $2.00 terminal charge, *or the language of the so-called absorption clause.* With the evident purpose of obviating the necessity of changing its published tariffs, whereby they probably would be subjected to objections from the public and hearings

before the Commission to inquire into the reasonableness of their rates, the line-haul carriers, to settle the controversy which had arisen between them and the Stock Yard Company concerning who should pay the additional 25 cents per car called for in the increased tariff schedules of the Stock Yard Company, combined with the Stock Yard Company to exact the additional 25 cents per car from the shipper by the circuitous and indirect means condemned by the Commission.

The Interstate Commerce Commission, after the consideration of the testimony of nearly 100 witnesses and a great mass of documentary evidence, decided that such practice was unreasonable and unlawful and that the parties to said practice should make reparation to the petitioners in this cause from whom they received the unlawful charges in question.

The question of whether it was the duty of the shipper or of the line-haul carrier to unload live stock at the Union Stock Yards in Chicago was essentially an administrative matter, inseparably connected with the rate-making power and functions of the Commission. There being an abundance of evidence in the record to support the finding of the Commission that the duty of unloading such live stock at the Union Stock Yards was on the line-haul carriers, the Circuit Court of Appeals should not have substituted its judgment for that of the Commission on that subject. (*Western Chemical Co.* v. *United States*, 271 U. S. 268; *Interstate Commerce Commission* v. *L. & N. R. R.*, 227 U. S. 88.) The matter of determining whose duty it was to unload live stock at the Union Stock Yards was a matter "committed to the decision of the administrative body, which in each instance is required to fix reasonable rates and establish reasonable practices." (*Atchison, T. & S. F. R. R.* v. *United States*, 232 U. S. 199, at page 221.)

The purpose of the Transportation Act was to establish a tribunal to determine the relation of communities, shippers and carriers, and to fix their respective rights and obligations. *U. S.* v. *Pacific and A. R. and Nav. Co.*, 228 U. S. 87.

The holding of the Circuit Court of Appeals that it is the duty of the shipper of live-stock generally to unload his live-stock at the Union Stock Yard in Chicago, is "in the teeth" of the holdings of this Court in *United States* v. *Union Stockyard Co.*, 226 U. S. 286 at 304, and *Covington Stock Yards* v. *Keith*, 139 U. S. 128-136. While the holding of the Circuit Court of Appeals on this question was clearly erroneous, even if correct, it would not be necessarily decisive of this case,—because even if this duty, as a general proposition of law, was one incumbent on the shipper, the line-haul carriers by undertaking in their published tariffs to perform such duty through their agent and in including in such tariffs compensation therefor are bound to stick by such published tariffs.

It is manifest that if the line-haul carriers in their published tariffs held themselves out to the public as performing the unloading service in question at the Union Stock Yards, and the rates and charges in such published tariffs contained compensation to the line-haul carriers for such service, the only possible way in which the cost of that service to the shipper could lawfully be increased would be to comply with paragraph 3 of Section 6 of the Interstate Commerce Act, which provides:

> "No change shall be made in the rates, fares and charges, or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be

made in the schedule then in force and the time when the changed rates, fares and charges will go into effect."

See *United States* v. *Miller*, 223 U. S. 599; *Robinson* v. *Baltimore & Ohio*, 222 U. S. 506-508; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, at page 425.

It is admitted that the line-haul carriers made no attempt, after the Stock Yard Company had increased its charge to them for the unloading service, of complying with the provisions of the paragraph above quoted. The first question which arises then is: Where a line-haul carrier performs certain terminal services in connection with the transportation of live stock through an agent which happens to also be a common carrier, and such agent increases its charges to the carrier for the performance of such service and files its published tariffs accordingly, does the filing of such tariffs by the agent inure to the benefit of the carrier, so that the carrier may lawfully, without changing its own published tariffs, join with the agent in a practice whereby there is exacted from the shipper an amount over and above the amount specified in the published tariffs of the line-haul carrier?

It would seem that the answer to this question should be obvious. The shippers in this case sustained no relation whatever to the Stock Yard Company, and there was no privity of contract between such shippers and the Stock Yard Company. *The Stock Yard Company issued no waybill or bill of lading. Its activities were limited to the performance of a terminal service for the line-haul carriers and as their agent.* (See *Warehouse Co.* v. *United States*, 283 U. S. 501 at p. 506-508; Arbuckle case (*United States* v. *Balt. & O. Ry.*, 231 U. S. 274.) There is no evidence in the record in this case that the published tariffs of the Stock Yard Company were on

file in the offices of the line-haul carriers so that the shipper doing business with the line-haul carriers could see and examine the same, as the Interstate Commerce Act requires in all cases where the shipper is to be bound by the terms and provisions of a published tariff.

We insist that the Interstate Commerce Act has not changed or abrogated the rules of the common law with reference to the relation of principal and agent between persons and corporations classified as common carriers, except as expressly changed by the Act. *Union Pac. R. Co.* v. *Updike Co.*, 178 Fed. 223, affirmed in 222 U. S. 215; that the requirement of the Transportation Act that all common carriers must publish tariffs of their rates and charges, does not mean that one common carrier as principal, agreeing with the shipper to transport and unload his live stock at the Union Stock Yards, may not contract with another common carrier performing the unloading services to pay the latter its charges for such service, and that such agent common carrier may not so restrict its published tariffs for the service to be performed by it for its principal as not to affect the shipper, but only to affect its principal for whom it renders the service; that there is nothing in the Interstate Commerce Act which indicates that it was the intent of Congress that the reciprocal rights and interests of the shippers and of the line-haul carriers, growing out of the published tariffs of the line-haul carriers, might be automatically changed by the filing of new tariffs by an agent of the line-haul carriers performing some terminal service for the line-haul carriers which the latter in their published tariffs held themselves out to the public as performing.

In order to sustain the decision of the Circuit Court of Appeals it must be held that the filing by the Stock Yard Company on May 21, 1917, of new tariff schedules,

to which the line-haul carriers were not parties, increasing the amount of their charges for the unloading service, automatically changed and modified the reciprocal rights of the shippers growing out of the published tariffs of the line-haul carriers.

Point II.

The Circuit Court of Appeals was also probably wrong in holding that the absorption clause in the published tariffs of the line-haul carriers constituted the limit of the line-haul carriers obligation to pay any part of the unloading service. It is clear that the total compensation to the carriers for the entire transportation of cattle to the Union Stock Yards, including unloading, was contained in their line-haul rates and/or in the $2.00 terminal charge, and the Commission so found. (R. 144) The absorption clause neither added to nor detracted from the service specified in the tariffs or the rates and charges specified for such service. It was merely a gratuitous or explanatory statement in the tariffs meaning no more than if it had stated that the carriers would absorb the charges of all carriers performing the services covered by the terminal charge of $2.00. If the so-called absorption clause had been entirely omitted the legal effect of the tariffs of the line-haul carriers would have been exactly the same. It would have been implied, in the absence of a statement to the contrary, that the line-haul rates, plus the $2.00 terminal charge, covered every service incidental to the transportation of the live stock to the Union Stock Yards, including unloading.

The case of *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is directly in point. There the court, on page 105, says:

"The carrier is under no obligations to charge for

terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The absorption clause added no obligation or duty on the part of the carriers which was not already included in the tariff. The meaning, object and purpose of the absorption clause must be determined in the light of its surrounding facts. It is clear that at the time such absorption clause was first put into the tariff schedules of the line-haul carriers, it was the intent of the carriers to absorb the entire unloading charge. There is nothing to indicate that at that time such clause was intended as a limitation upon the amount which the line-haul carriers would pay their agent, the Stock Yard Company, for performing for them the unloading service. When first put into the published tariffs of the line-haul carriers it coverd the entire obligation and charge of the unloading service. The only possible way in which that situation could be changed as between the shipper and the line-haul carriers would be by a change in the published tariffs of the line-haul carriers, specifically stating that the line-haul carriers in the future, instead of paying the entire charges of the Stock Yard Company, as in the past, would only pay a part of such charges.

Davis v. *Portland Seed Co.* 264 U. S. 403, at p. 425.

United States v. *Miller,* 223 U. S. 599-605.

Point III.

In holding that the classifications and provisions of the Uniform Live Stock Contract incorporated in the published tariffs of the line-haul carriers were controlling on the question of whether it was the duty of the line-haul carriers or of the shippers to unload live

stock at the Union Stock Yards in Chicago, the Circuit Court of Appeals set at naught the finding of the Commission (R. 144) that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards." The record in this case shows that the tariffs involved in this proceeding were extremely voluminous and complicated. We invite the attention of the court to Original Exhibit 1, where such tariffs are contained.

This court recently in *Standard Oil Co.* v. *United States*, 283 U. S. 235, at page 236, used language which is particularly appropriate to the question here under discussion. There this court says:

> "The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law; but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that 'both cases concern unusually complicated and technical tariff situations,' the proper determination of which called for the exercise of the trained judgment of that body of experts, 'appointed by law and informed by experience.' *Illinois Central etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454, 27 S. Ct. 700, 51 L. Ed. 1128. And to that body, in the interest of uniformity, the determination must be left."

The holding of the Circuit Court of Appeals that the classifications and provisions of the Uniform Live Stock Contract were determinative of the question of whether it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards in Chicago, or whether it was the duty of the shippers to perform such service,

being in direct conflict with the holding of the Commission on that subject, was tantamount to a statement that the Interstate Commerce Commission was unable or incompetent to determine the meaning, force and effect of railroad tariffs. The Circuit Court of Appeals in so holding also completely overlooked the well-established proposition that the line-haul or commodity tariffs specifically naming rates and charges between particular points take precedence over the classification tariff which names no specific rates or points.

In *Galveston, etc. Ry. Co.* v. *Lykes Bros.*, 294 Fed. Rep. 968, the court, on page 971, says:

> * * * "it is a matter too well settled by the rules of the Commission, affirmed by the courts, that where a commodity rate is made in the tariff such commodity rate is the lawful rate and the only rate that can be used; the class rates are by it superseded."

The record in this case shows conclusively that the classifications referred to by the Circuit Court in its opinion did not apply at the Union Stock Yards, Chicago. (Excerpts from Original Exhibits 167 to 172) The record in this case also conclusively shows the establishment by the tariffs of the line-haul carriers of line-haul rates to Chicago, which line-haul rates, plus a charge of $2.00 for terminal or switching service, as the Commission holds, "constituted the through charge and included delivery of live stock to the consignee at the Stock Yards." These classifications referred to by the Circuit Court in its opinion were not new, but were contained in every tariff schedule filed by the line-haul carriers from the time they were required to file such schedules by the Interstate Commerce Act.

That there was a specific line-haul or commodity rate to the Union Stock Yards at Chicago is clearly shown by

the record in this case (See Printed Excerpts from Original Exhibits, pp. 167, 169, 171, 172). We invite attention particularly to the testimony of H. W. Beyers, Assistant Freight Traffic Manager, Chicago & North Western Railroad. (Printed Excerpts from Original Exhibits, p. 171). It should also be noted that in the tariff schedules of the line-haul carriers the "Union Stockyards, Ill." is specifically named as a station to which the base rate is applied. (Excerpts from Original Exhibits p. 167)

The court in this connection further completely overlooked the rule that if there was any ambiguity in the tariff schedules published by the line-haul carriers, such tariffs must be construed most favorably to the shipper and against the line-haul carriers. (*Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, at page 105; *Southern Pacific Co.* v. *Lothrop,* 15 Fed. (2d) 486; *Sutherland Flour Mills Co.* v. *Director General,* 81 I. C. C. 365; *N. W. Steel Co.* v. *Director General,* 68 I. C. C. 195; *Pacific Rice Mills Co.* v *Director General,* 78 I. C. C. 459.)

Point IV.

The Circuit Court of Appeals in holding that the Stock Yard Company was compelled under the law to collect from the shippers the full amount of their charges specified in their published tariffs, was also probably in error. As above stated, the Stock Yard Company sustained no relation, contractual or otherwise, to the shippers. There was no privity of contract or relation between the Stock Yard Company and the shippers. The Stock Yard Company in filing its tariffs did so "as a carrier's agent" for the purpose of restricting the operation of such tariff to the line-haul carriers for whom it per-

formed the unloading service. The words "as a carrier's agent" in the published tariffs of the Stock Yard Company cannot be disregarded. Such words were clearly intended to convey the meaning that the rates and charges contained in the published tariffs of the Stock Yard Company were meant to apply to the line-haul carriers and were not to affect the shipper. Such at all times was the intention and position of the Stock Yard Company during the controversy which arose between it and the line-haul carriers concerning the manner of the handling of the collection of the extra 25 cents per car, and at the hearings before the Commission. (See Printed Excerpts from Original Exhibits, pp. 2 to 21, 34 to 36, 54 to 56) If the line-haul carriers were compelled under the law to collect the 25 cents per car in question from the shippers, then why were they not compelled to collect the entire amount from the shippers? There is no authority to be found in the books for the splitting of a tariff charge so as to allow a part of the charge for a given service to be collected from the shipper and a part from the line-haul carrier. If the service in question is with reference to a service or duty which it is incumbent upon the shipper to perform, then the entire charge must be against the shipper. On the other hand, if the service or duty performed is that of the line-haul carrier, for which service it is compensated for in its line-haul rates and/or its published terminal charge, a part of such service or duty or charge therefor cannot be imposed on the shipper.

Conceding that it was the duty of the Stock Yard Company under its published tariffs to collect the entire amount of its increased charges for the loading and unloading service from the line-haul carriers, it does not follow that it was the duty of the Stock Yard Company to cooperate with the line-haul carriers in the promul-

gation of a practice whereby the shipper was compelled to pay for the transportation and unloading of his live stock an amount in excess of the amount for which the line-haul carriers in their published tariffs undertook to perform such service, and whereby respondents settled a controversy between themselves as to the extra 25 cents per car by exacting it from your petitioners.

Point V.

The ingenuous reasoning of the Circuit Court of Appeals for its conclusion that "notwithstanding the seeming circuity it was the Stock Yard Company which in effect collected the charge from the shipper or consignee," does not answer the contention made by petitioners that even though the Stock Yard Company may have been obligated under the Interstate Commerce Act to collect the full amount of the charges specified in their published tariffs, that circumstance did not justify the Stock Yard Company in joining with the line-haul carriers, in order to settle a controversy between them, in the promulgation of a practice whereby there was exacted from the shipper an amount in excess of the rates and charges specified in the published tariffs of the line-haul carriers for performing for the shipper the entire transportation of live stock to the Union Stock Yards, including the unloading thereof. If the Stock Yard Company was in duty bound under the law to collect the full amount of its published rates and charges, it should have collected the same from the line-haul carriers for whom it performed the services in question, in accordance with the intent of its published tariffs. The joining of the Stock Yard Company with the line-haul carriers in the promulgation of a practice which resulted in the exaction from the shipper of a charge in addition to

the charges specified in the published tariffs of the line-haul carriers was a wrongful and tortious act, which rendered the line-haul carriers and the Stock Yard Company jointly and severally liable regardless of which of them actually received the money or the benefit thereof. (*Lewis* v. *Southern Pacific Co.*, 283 U. S. 654; *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.)

Point VI.

It requires little argument to show that the finding of the Circuit Court of Appeals that the extra charge of 25 cents per car for the unloading service was justified because of extraordinary conditions existing at the time said charges were collected and on account of the increase in the cost of labor and other costs of service at that time.

The rule is well established that courts are without power to make rates or to determine what is or is not a reasonable rate or a justification for an increase in a rate. Such matters are vested exclusively in the Interstate Commerce Commission, and the determination of the Commission on such questions are conclusive and not subject to review by the courts, unless the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. Ry. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282 at p. 296 to 298.)

There never has been any contention in this case that the findings of the Interstate Commerce Commission

were not sustained by the evidence, nor is there any such intimation in the opinion of the Circuit Court of Appeals; nor does that court intimate that the Commission in this case transcended its constitutional or statutory powers. The opinion of the Circuit Court of Appeals is based entirely on these propositions (1) that it does not agree with the Interstate Commerce Commission as to its interpretations of the tariffs involved in this case; (2) that it does not agree with the findings of the Commission on questions of fact pertaining to whose duty it is to load and unload live stock at the Union Stock Yards in Chicago; that it does not agree with the Commission as to the facts in this case relative to who actually collected the extra 25 cents per car in question; (4) that it does not agree with the conclusion of the Commission that the practice adopted by respondents to exact the extra 25 cents per car from the shipper was unreasonable, because it, the court, is of the opinion that the extra 25 cents per car was justified by extraordinary conditions existing at that time and on account of the increased cost of labor and cost of service in general.

Furthermore, the question of whether the extra 25 cents per car was justified because of the conditions prevailing at that time could not be determined without also inquiring into the flat increases made to the line-haul carriers in their line-haul rates based on the extraordinary conditions then prevailing, and on the increased cost of labor and other items of transportation service. The record shows that the line-haul rates of the carriers, including the rates on live stock, which, in part, included the unloading charge, were, on account of the very conditions mentioned by the Circuit Court of Appeals in its opinion, increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent

of the then existing line-haul rates (See Original Ex. 7, pp. 861, 890, 891). It may be that the flat increases in the line-haul rates were sufficient, or more than sufficient, to compensate for an additional 25 cents per car in the unloading service. The situation, therefore, is similar to the situation presented to this court in *Interstate Commerce Commission* v. *Chicago, B. & Q. R. R. Co.*, 186 U. S. 320, and the same reasoning applies. However, the question of the reasonableness of the additional 25 cents per car was not involved, because before the reasonableness of an increased charge may become involved, the carrier must, in the manner required by paragraph 3 of Section 6 of the Interstate Commerce Act, amend its published tariffs to show such increase. If the line-haul carriers had amended their tariffs so as to show such increase, under requirements of the transportation act the burden to prove the reasonableness of the increase would have been upon the carriers.

Point VII.

The action of the Circuit Court of Appeals in affirming the judgment of the District Court has sanctioned the rule laid down by the District Court in the instant case and thus given it the effect of law and precedent. The decision of the Commission in the *Missouri Portland Cement Co.* case, 88 I. C. C. 492, was specifically based on the opinion of this court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531. The rule laid down in the *Missouri Portland Cement Co.* case has become the established practice of the Commission. The decision of the District Court reported in 39 Fed. (2nd) 80 directly declares that established rule of the Commission to be unauthorized and invalid, and has raised anew doubt and dissension among the members of the Com-

mission on that subject. (*General Grinding Wheel Corporation* v. *Southern R. R. Co.*, 169 I. C. C. 83.)

A.

The provisions of the Interstate Commerce Act are strictly remedial for the benefit of shippers and the general public, and were enacted as a curb and protection against the carriers and should therefore be given a liberal construction in order that the true spirit and intent of the Act may be effectuated. In construing said Act much regard must be had for the needs of particular and efficient administration and a uniformity in procedure. The Interstate Commerce Commission is the body charged with the enforcement of the Interstate Commerce Act, which includes proceedings for reparation for unlawful or unreasonable charges, or for charges growing out of unlawful or unreasonable practices, and the finding of that body is, under the provisions of Section 16 of the Act, *prima facie* correct and sufficient to form the basis of an action in the courts based on a violation of the shippers' rights, and where there is sufficient evidence in the record before the Commission to sustain its order of reparation, and where the Commission has not acted arbitrarily or transcended its constitutional or statutory powers, the findings and orders of the Commission should be accepted by the courts as conclusive. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) Inasmuch as the Interstate Commerce Commission has for many years uniformly construed and interpreted the Act in such a way as to allow the consignee in the transportation transaction, and from whom the unlawful or unreasonable charge in question was exacted, to recover damages without reference to whether such consignee in the last analysis bore the unlawful charge and ultimately suffered pe-

cuniary loss, such construction and interpretation of the Act should, if not plainly erroneous, be treated as read into the statute. (*Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 428; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361.)

There are particular reasons why the rule adopted by the Commission on this subject should be sustained by the courts:

1. Because if the right to recover reparation was confined to the persons who ultimately suffered pecuniary loss, a transgression of the law by a carrier would often go unpunished because of the impossibility in many cases of proving such ultimate pecuniary loss.

2. The exaction by the carrier of an unlawful or unreasonable charge becomes a tort at the instant of its exaction. (*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217.)

3. It is elementary that a tort feasor charged with the commission of a tort cannot raise any question concerning reciprocal rights or equities as between the person against whom the tort was committed and third persons (*Winne* v. *Hammond*, 37 Ill. 99); "the general tendency of the law in regard to damages at least is not to go beyond the first step" (*Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531).

4. Inasmuch as, under the established law, the consignee to whom property is delivered, by accepting the delivery of the property, becomes primarily liable to the carriers for any undercharge in the amount of the carriage charges (*New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406; *Doughty-McDonald Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 155

I. C. C. 47, 49; *Union Pacific Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720), it logically follows that such consignee under like circumstances should be vested with the right to recover from the carrier the amount of any unlawful or unreasonable charge exacted from him by the carrier.

5. Regardless of the liberal provisions of the Interstate Commerce Act to enable the shippers and the public to relief against unreasonable or unlawful rates or practices of common carriers, it has always been the law that in a case involving the shipment of property over the lines of a common carrier, either the owner of the property or consignor, or the consignee named in the shipment, have sufficient interest in the subject matter to maintain a suit against the carrier on account of the commission of any tort by the carrier with reference to the transportation transaction. (*Edgerton* v. *Chicago, R. I. & P. Ry. Co.*, 240 Ill. 311; *Finn* v. *Western R. R. Co.*, 112 Mass. 524; *Hooper* v. *Chicago & North Western Ry. Co.*, 27 Wis. 81; *Southern Express Co.* v. *Kraft*, 49 Miss. 480.)

B.

The right of petitioners to maintain this suit in the District Court may also be sustained on the ground that in this case the record before the Commission conclusively shows that the petitioners herein prosecuted said claims for reparation before the Commission by reason of express authority from the shippers whom they severally represented in said claims for reparation before the Interstate Commerce Commission for the use and benefit of said shippers, and that petitioners therefore had the right to maintain the suit in the District Court as representatives of, and for the use and benefit of, the several shippers whom they severally represented before said

Commission. When all of the various orders and reports of the Commission entered and filed in the progress of the proceedings in the instant case before the Commission are read together, they show beyond question that the petitioners in this case sought reparation and obtained the same for the shippers in their representative capacities for the use and benefit of the shippers whom they respectively represented in the matter of the presentation and allowance of said claims. Their right as factors and agents to maintain said proceedings for reparation before the Commission for and on behalf of the shippers whom they severally represented, is sustained by the following authorities: Sections 13, 14 and 16 of the Transportation Act; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; *Phillips Co.* v. *Grand Trunk R. R. Co.*, 236 U. S. 662; *Arcadia Mills* v. *Carolina, C. & O. Ry.*, 293 Fed. 639; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, at page 39.

Such right is also recognized and applied by the Interstate Commerce Commission in hundreds of cases, among such cases being *Independent Refiners Ass'n* v. *Western N. Y. & Pa. R. R. Co., et al.*, 6 I. C. C. 378; *Hercules Powder Co.* v. *New York Central R. R. Co., Director General as Agent, et al.*, 78 I. C. C. 55; *Memphis Freight Bureau* v. *St. L.-S. F. Ry. Co. and Director General*, 57 I. C. C. 212; *Detroit Coal Exchange* v. *Director General*, 80 I. C. C. 258; *Western Electric Co.* v. *Director General*, 87 I. C. C. 545; *Texas Live Stock Shippers' League* v. *Director General*, 139 I. C. C. 448; *Cattle Raisers' Ass'n of Texas and Chicago Live Stock Exchange* v. *C. B. & Q. R. R. Co.*, 10 I. C. C. 83; *Michigan Hardwood Mfrs. Ass'n* v. *Transcontinental Freight Bureau*, 27 I. C. C. 32; *Commercial Club of Omaha* v. *Anderson, et al. Ry. Co.*, 41 I. C. C. 480; *Tanners' Council of the U. S.* v. *Director General*, 78 I. C. C. 27.

The finding of the Commission in its report of June 2, 1925, (R. 147-151) as to the relationship between petitioners and the shippers whom they severally represented in the various transportation transactions involved, and the right of such petitioners to maintain said proceedings for reparation in their representative capacities and in their own names to recover the unlawful charges exacted from them as a result of said unlawful and unreasonable practice, should have been accepted by the District Court and by the United States Circuit Court of Appeals in this case. (*Western Chemical Co.* v. *United States*, 271 U. S. 268; *Virginia Railway Co.* v. *United States*, 272 U. S. 568; *United States* v. *Erie R. R. Co.*, 280 U. S. 103.)

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and to such an end a writ of certiorari should be granted in order that this Honorable Court may review the decision of the Circuit Court of Appeals for the Seventh Circuit and after such review reverse it.

Franklin J. Stransky,
Clair R. Hillyer,
James P. Carey, Jr.,
Counsel for Petitioners.

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DEC 21

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, CO-PARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, ETC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CERTIFIED EXCERPTS FROM ORIGINAL EXHIBITS WHICH ORIGINAL EXHIBITS ARE TRANSMITTED TO THIS COURT PURSUANT TO ORDER OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANKLIN J. STRANSKY, ESQ.,
CLAIR R. HILLYER, ESQ.,
JAMES P. CAREY, JR., ESQ.,
Counsel for Petitioners.

A. A. MCLAUGHLIN, ESQ.,
EDGAR R. HART, ESQ.,
SILAS H. STRAWN, ESQ.,
RALPH M. SHAW, ESQ.,
FRANK H. TOWNER, ESQ.,
SIDNEY F. ANDREWS, ESQ.,
Counsel for Respondents.

BLAKELY-WARREN PRINTING COMPANY, CHICAGO.